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No. 95-1918

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Tax Injunction Act, 28 U.S.C. 1341, bars the district court from exercising jurisdiction over a suit by a privately owned production credit association, which is statutorily defined as a "federal instrumentality," to challenge the imposition of state taxes.

2. Whether the State of Arkansas may levy sales and income taxes upon production credit associations consistent with 12 U.S.C. 2077.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents are four production credit associations chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*). Pet. App. B1. Production credit associations were first established by the Farm Credit Act of 1933, ch. 98, § 20, 48 Stat. 259. Those associations are part of the United States' farm credit system, which includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a). Production credit associations, like each entity within the farm credit system,

are statutorily defined instrumentalities of the United States. 12 U.S.C. 2071(a) and (b)(7) (production credit associations); 12 U.S.C. 2011(a) (farm credit banks), 2091(a) and (b)(4) (federal land bank associations), 2121 (banks for cooperatives).

Production credit associations are organized generally by ten or more farmers or ranchers, 12 U.S.C. 2071(b)(1), to provide short- and intermediate-term loans for agricultural purposes and for certain types of rural housing, 12 U.S.C. 2075. In order to encourage and assist those organizations, the United States, through Production Credit Corporations, originally subscribed to some of the stock in production credit associations formed under the 1933 Act. See H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971). By 1968, the United States' ownership interest in previously organized associations had been retired, and production credit associations were owned entirely by their private borrower-members. *Ibid.* Today, there are 66 chartered production credit associations operating throughout the United States. Farm Credit Administration, *1995 Annual Report on the Financial Condition and Performance of the Farm Credit System* 5 (1996).

2. In the Farm Credit Act of 1933, the obligations of production credit associations, such as notes, debentures and bonds, "both as to principal and interest," were exempted from all federal, state, and local taxation, "except surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. Production credit associations themselves, along with their property and income, also were exempted from all taxation, except that their real property and their tangible personal property were subject to "Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Ibid.* If and when the United States retired its stock ownership in a production credit association (through a production credit corporation), however, the exemption on taxation of the association, its property, and its income was no longer effective. *Ibid.*

When Congress amended the Farm Credit Act in 1971, all previously organized production credit associations were privately owned. H.R. Rep. No. 593, *supra*, at 8. Congress nevertheless retained each production credit association's stated exemption from taxation. That exemption, however, remained the same as it had been before the 1971 amendments—an exemption from taxation for only so long as the United States (through the Farm Credit Administration) held stock in the association. Pub. L. No. 92-181, § 2.17, 85 Stat. 602. The amended statute provided:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.*

Ibid. (emphasis added).

In 1985, Congress passed the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678. That

Act restructured the Farm Credit Administration so that it would no longer be controlled by a Governor but by a three-member board, § 201(1), 99 Stat. 1688, and modified the role of the Farm Credit Administration within the farm credit system, see § 201(7), 99 Stat. 1691. Because of the changes to "the basic powers, duties and authorities of the Farm Credit Administration," the Act also contained "numerous technical and conforming amendments." H.R. Rep. No. 425, 99th Cong., 1st Sess. 28 (1985); see Pub. L. No. 99-205, § 205, 99 Stat. 1703-1707. Among those technical amendments was the deletion of the two sentences within Section 2.17 of the 1971 Act italicized above that exempted a production credit association from taxation contingent upon stock ownership by the "Governor of the Farm Credit Administration." Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1705. The 1985 Act left the section, then codified at 12 U.S.C. 2098 (Supp. III 1985), much as it presently exists, now codified at 12 U.S.C. 2077.[1] The amended Section 2077 retains the 60-year-old statutory exemption from federal, state, and local taxes for "all notes, debentures, and other obligations issued by" the production credit associations, "except surtaxes, estate, inheritance, and gift taxes." The statute does not afford the associations any additional exemptions from taxation, regardless of the federal government's stock holdings.

3. Respondents brought suit in the United States District Court for the Eastern District of Arkansas against

[1] In 1988, Congress reenacted without any change the text of Section 2098, which was redesignated as Section 2077, in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633. Congress subsequently amended Section 2077 by inserting a comma after "interest" and by adding a second exception to the tax exemption, inserting the clause "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority." Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998.

the State of Arkansas, requesting both a declaratory judgment that they are exempt from state sales and income taxes and an injunction prohibiting petitioner from levying such taxes upon them. Pet. App. A1. In their motion for summary judgment, respondents contended that they were entitled to constitutional immunity from state taxes because they are federal instrumentalities of the United States and because Congress did not expressly waive that immunity. *Id.* at A2. Petitioner conceded that respondents are federal instrumentalities. *Id.* at A3. Petitioner argued, however, that federal instrumentality status does not *per se* entitle respondents to state and local tax immunity, and that there must be a factual inquiry into respondents' governmental nature before they may be deemed to be instrumentalities immune from state taxation (*id.* at A2). Alternatively, petitioner contended that the history of Section 2077 showed that Congress had granted production credit associations only a limited exemption from taxation and had, therefore, waived respondents' constitutional immunity (see *id.* at A6).

The district court granted respondents' motion for summary judgment, concluding that, as federal instrumentalities, respondents are entitled to immunity from state taxation. Pet. App. B1-B3. The district court held that, although Congress may waive the constitutional immunity of the United States or its instrumentalities from state or local taxation, the waiver must be express; an "implied" waiver is insufficient. *Id.* at B3. The district court also rejected petitioner's argument that the Tax Injunction Act, 28 U.S.C. 1341, divested the court of jurisdiction over respondents' suit. Pet. App. B1-B2.

4. The court of appeals affirmed by a 2 to 1 decision. Pet. App. A1-A12. The court held that, under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, "states have no power to tax federally created instrumentalities absent Congressional authorization." Pet. App. A3. The factual extent of the United States'

control or ownership of respondents is irrelevant, in the court's view, because production credit associations are statutorily defined federal instrumentalities performing recognized constitutional functions. *Id.* at A4-A5. The court also determined that Congress's failure to provide statutorily that production credit associations are immune from taxation does not create an implied waiver of the immunity under the Supremacy Clause. *Id.* at A6. Any waiver from the constitutional immunity must be express, and "[t]here is no provision in any statute * * * which indicates an intent on the part of Congress to waive the [production credit associations'] tax immunity as federal instrumentalities." *Ibid.*

In dissent, Judge Loken stated that it is solely Congress's province to decide which and to what extent federal instrumentalities are entitled to immunity from state taxation. Pet. App. A6-A7. After tracing the history of production credit associations, he observed that the only comprehensive tax exemption Congress had ever granted such an association had been contingent upon the United States' stock ownership in it. *Id.* at A8-A10. By 1968, however, the United States did not own stock in any production credit association. *Id.* at A10. Judge Loken placed emphasis on the legislative history of the 1985 amendment to Section 2077 that deleted the sentences conferring the contingent tax exemption. He read that legislative history to establish Congress's intent for the amendment to create only a "technical change" that was likely designed to remove the reference to the Governor of the Farm Credit Administration, who was being replaced by a three-member board. *Id.* at A11.

> Although more than the reference to the Governor was deleted, that is a logical explanation since there were *no* publicly-owned [production credit associations] in 1985 eligible to enjoy the deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption for which no [production credit association] remained eligible, as the grant of a far broader implied exemption.

Ibid. Judge Loken concluded that, because production credit associations were not in fact exempt from taxation before the 1985 amendment to Section 2077, they are not entitled to exemption after the amendment. *Id.* at A12.

DISCUSSION

The decision of the court of appeals is incorrect, both in its implicit jurisdictional holding and in its holding on the merits. First, the court's implicit decision to uphold the district court's exercise of jurisdiction conflicts with decisions of other courts of appeals denying jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341, over suits by a federal instrumentality that neither is joined as a plaintiff by the United States nor otherwise implicates an important governmental function or interest in the lawsuit. Moreover, on the merits, the court's holding erroneously construes the Farm Credit Act of 1971, 12 U.S.C. 2077, in a manner that calls into question long-standing impositions of state taxes on production credit associations in which the federal government does not have an ownership interest.

1. Although the court of appeals did not explicitly address the district court's jurisdiction over this case, it is well-settled that subject-matter jurisdiction may be raised at any point in litigation, even by this Court's own motion. See, *e.g.*, *Sumner* v. *Mata*, 449 U.S. 539, 547 n.2 (1981); *Louisville & N.R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). See also C. Wright, *Law of Federal Courts* 28 (5th ed. 1994) (suggesting that rule has special justification when problems of federal-state relations

are involved).[2] The courts of appeals take differing approaches over whether, in light of the prohibition contained in the Tax Injunction Act, 28 U.S.C. 1341, federal courts have jurisdiction to hear suits brought by "instrumentalities" of the United States to enjoin state taxes, when the United States is not also a plaintiff in the action. The decision by the court below implicitly to uphold jurisdiction is both incorrect and contrary to decisions of other courts of appeals.

a. The Tax Injunction Act, 28 U.S.C. 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[3]

This Court has recognized that Section 1341 "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). In that case, the Court considered whether Section 1341 operated to bar a suit by the American Red Cross and the United States as co-plaintiffs to enjoin application of a Colorado unemployment compensation tax to the Red Cross. The Red Cross asserted that it was a "federal instrumentality," a contention supported by the United States as co-plaintiff, and that to impose the state tax would be unconstitutional under *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This Court held that "an unbroken line of authority and convincing evidence of legislative purpose" established that the United States could bring suit "to protect itself and its instrumentalities from unconstitutional state exactions." 385 U.S. at 358 (footnote omitted).

The district court in this case cited *Department of Employment* in concluding that a challenge to its jurisdiction was "without merit" (Pet. App. B2). That court summarily denied a motion to dismiss, and the court of appeals did not address that issue in its opinion.

b. Contrary to the summary treatment by the courts below, the question whether a "federal instrumentality" may overcome the bar of Section 1341 when the United States is not a plaintiff has divided the courts of appeals. This Court has not had occasion since *Department of Employment* to consider whether, and if so under what circumstances, a federal instrumentality may bring suit to enjoin state taxes when the United States is not a co-plaintiff.[4]

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[2] The jurisdictional bar in the Tax Injunction Act has been held to be non-waivable. See, *e.g.*, *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992); *Keleher* v. *New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2d Cir. 1991); *Hardwick* v. *Cuomo*, 891 F.2d 1097, 1103-1104 (3d Cir. 1989). See generally R. Fallon, D. Meltzer & D. Shapiro, eds., *Hart and Wechsler's The Federal Courts and the Federal System* 1217 (4th ed. 1996). This view is consistent with this Court's decision in *California* v. *Grace Brethren Church*, 457 U.S. 393, 417 & n.38 (1982), in which the Court held that the Tax Injunction Act deprived the district court of jurisdiction even though the State had attempted to invoke that court's jurisdiction. Thus, the apparent failure of petitioner to raise on appeal, and of the court of appeals to consider, the jurisdictional question should not inhibit this Court's review of that issue.

[3] This Court has held that the statute is jurisdictional and applies to suits for a declaratory judgment as well as to suits for an injunction. *California* v. *Grace Brethren Church*, 457 U.S. at 408-411; *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 338-339 (1990). Cf. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943).

[4] By statute, only the Department of Justice may represent the United States in litigation. Section 516 of Title 28 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

By statute, each production credit association has the power to "sue and be sued," 12 U.S.C. 2073(4), but that provision does not

The Ninth and Second Circuits have been the most restrictive in permitting federal instrumentalities, without the United States as a plaintiff in the action, to seek equitable relief from state taxation. In *Housing Authority of Seattle* v. *Washington*, 629 F.2d 1307 (1980), for example, the Ninth Circuit addressed whether a housing authority could sue to enjoin state taxation absent the United States as a party to the suit. As the court noted, "[t]he United States * * * is not a party to the present suit. The record does not reflect whether the Authority requested the United States to join as plaintiff, nor whether the Justice Department was even aware of the suit." *Id.* at 1311. Citing *United States* v. *State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), the court in *Housing Authority* "agree[d] that such joinder [of the United States] is necessary before a federal instrumentality can overcome the restrictions of [Section 1341]." 629 F.2d at 1311.

The court further noted, however, that the First Circuit had subsequently created an exception to the "general principle requiring joinder of the United States with the federal instrumentality," 629 F.2d at 1311, when the federal instrumentality was effectively an "arm[] of the federal government" and a state tax "called directly into question the sovereign interest of the United States," *ibid.* (quoting *Federal Reserve Bank of Boston* v. *Commissioner of Corporations & Taxation of Massachusetts*, 499 F.2d 60, 62 (1st Cir. 1974)). Although in *Housing Authority* the Ninth Circuit reserved the question whether it would agree with the First Circuit's approach in *Federal Reserve Bank*, it concluded that, even under the First Circuit test, the housing authority was "not the kind of federal instrumentality" that may "maintain a suit in federal court challenging state taxation without the United

empower a production credit association to represent the United States in litigation; it only authorizes the production credit association to represent itself in a lawsuit. See *ibid.*

States joining as a plaintiff in the suit." 629 F.2d at 1311-1312.[5]

In *FDIC* v. *New York*, 928 F.2d 56 (1991), the Second Circuit affirmed the dismissal under Section 1341 of an injunction suit brought by the FDIC against a State. An assistance agreement between the FDIC and a savings bank in questionable condition had assigned to the FDIC all of the bank's claims against any officers, underwriters or "any others." *Id.* at 58. The FDIC's suit contended that application of the state taxes at issue contravened a federal law giving the FDIC authority to issue promissory notes in exchange for banks' "net worth certificates," and thus violated the Supremacy Clause. *Id.* at 58-59.

Noting that "the federal instrumentality exception to the [Tax Injunction] Act is based on traditional principles of comity," the Second Circuit could not "find that the purposes of the instrumentality exception would be served by allowing the FDIC to proceed with this action in federal court," because "by bringing this suit, the FDIC was attempting to protect commercial lending institutions rather than the federal government." 928 F.2d at 59. The court concluded that the FDIC's legitimate interests in ensuring enforcement of federal banking laws could "be adequately protected if the suit, upon dismissal, is pursued in state court." *Ibid.*[6] The Second Circuit's

[5] In *California Credit Union League* v. *City of Anaheim*, 95 F.3d 30 (9th Cir. 1996), the jurisdictional question appears not to have been raised or noted.

[6] The Second Circuit also followed other courts of appeals in narrowly construing this Court's decision in *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which permitted an Indian Tribe to bring suit to enjoin the enforcement of a state tax notwithstanding the Tax Injunction Act. See 928 F.2d at 60-61 (collecting cases). In *Moe*, the Court construed the more recently enacted 28 U.S.C. 1362, which vests original jurisdiction in the district courts in actions brought by Indian Tribes, and concluded that that provision reflected Congress's intent that the

approach, therefore, assesses whether the federal instrumentality is bringing suit to protect some important governmental interest that warrants resort to federal, rather than state, court.

The First Circuit, on the other hand, has had several occasions to consider whether federal instrumentalities may bring suit by themselves notwithstanding the Tax Injunction Act. In *United States* v. *State Tax Commission, supra,* the court articulated the most restrictive principle (later adopted by the Ninth Circuit) that federal instrumentalities and the United States "stand on different footing as litigants in federal courts seeking to interfere with state taxing schemes." 481 F.2d at 975. The court likened the federal savings and loan associations in that case to "private corporations," and suggested that it was "reasonable, as a prerequisite to by-passing normal state tax collection and litigation channels, that they persuade the Attorney General of the United States, acting on behalf of the Home Loan Bank Board, to join in their claim." *Ibid.*

The First Circuit appeared to restrict the broad sweep of that rule in *Federal Reserve Bank.* In that case, the United States was not a co-plaintiff with the Federal Reserve Bank of Boston in its suit to enjoin state taxes, and the court considered whether that federal instrumentality should be treated differently from "instrumentalities like savings and loan associations." 499 F.2d at 62. In ruling that the Bank *was* different, the court laid stress on the fact that federal reserve banks "are plainly and predominantly fiscal arms of the federal government. Their interests seem indistinguishable from those of the sovereign and there are good reasons to relieve them of any symbolic requirement of joinder with and by the

Tax Injunction Act not be applied to prohibit suits by Indian Tribes to enjoin enforcement of state taxes. See 425 U.S. at 470-475.

United States." *Ibid.* The court concluded that "a state tax affecting one of the twelve federal reserve banks calls directly into question the sovereign interest of the United States." *Id.* at 63.

In *Bank of New England Old Colony, N.A.* v. *Clark,* 986 F.2d 600 (1993), the First Circuit continued to differentiate among federal instrumentalities which asserted that the Tax Injunction Act did not bar suit by them. In that case, the FDIC had been appointed receiver of an insolvent bank that had instituted a suit in state court for a refund of taxes the State of Rhode Island had imposed upon it. Although the FDIC had invoked its authorization under 12 U.S.C. 1819(b)(2)(B), which generally gives the FDIC authority to remove suits from state court to federal court, the district court granted the State's motion to remand pursuant to Section 1341, and the First Circuit affirmed. The court noted that a conflict among the circuits exists as to when a "federal instrumentality" may invoke the exception to the Tax Injunction Act for the "United States and its instrumentalities." 986 F.2d at 602. The court then noted that the First Circuit follows "a flexible test in which 'each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.'" *Id.* at 602-603 (quoting *Federal Reserve Bank,* 499 F.2d at 64). Because "[t]he FDIC's governmental role in this case is minimal" and "the benefit from the refund claim will flow principally to the bank's creditors and depositors, not to the federal treasury," *id.* at 603, the court concluded that the "federal instrumentality" exception to the Tax Injunction Act did not apply and that the suit to enjoin state taxes had properly been remanded to state court. *Ibid.*[7]

[7] In conflict with that decision, the Fifth Circuit held in *FDIC* v. *City of New Iberia,* 921 F.2d 610 (1991), that the FDIC, when appointed receiver of an insolvent federal savings and loan associa-

c. Under any of the approaches adopted by the First, Second, or Ninth Circuits, the district court would lack jurisdiction to consider petitioner's claim as a "federal instrumentality" purportedly exempt from the prohibition of the Tax Injunction Act. First, the United States is not a co-plaintiff in this lawsuit. See *Housing Authority*, 629 F.2d at 1311. Second, no substantial governmental interest is at stake that warrants keeping the suit in federal, as opposed to state, court. See *Bank of New England*, 986 F.2d at 602-603; *FDIC* v. *New York*, 928 F.2d at 59. And finally, the production credit associations at issue are not acting as "arms of the federal government," such that a state tax "call[s] directly into question the sovereign interest of the United States." *Federal Reserve Bank*, 499 F.2d at 62.

Because the court below failed to address an important issue of subject-matter jurisdiction on which substantial conflict exists in the courts of appeals, this Court should consider granting certiorari to determine whether the Tax Injunction Act permits production credit associations as "federal instrumentalities" to challenge in federal court the imposition of state taxes in the absence of the United States as a co-plaintiff.

2. a. As this Court has made clear, while "absent express congressional authorization[] a State cannot tax the United States directly," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 173-175 (1989) (citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), Congress determines whether, and to what ex-

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tion, could maintain in federal district court a suit seeking to enjoin enforcement of a local tax nothwithstanding the Tax Injunction Act. The Fifth Circuit there concluded that 12 U.S.C. 1730(k)(1) (1988) (later codified at 12 U.S.C. 1819(b)(2)), which provides removal power and federal question jurisdiction for cases involving the FSLIC (and the FDIC, as successor to the FSLIC), was sufficient to confer jurisdiction in the district court despite the Tax Injunction Act.

tent, instrumentalities performing federal functions are exempted from state and local taxation. *United States* v. *New Mexico*, 455 U.S. 720, 733-735, 737-738, 743-744 (1982); *Department of Employment*, 385 U.S. at 358, 359-361. Since the original enactment of the Farm Credit Act in 1933, Congress has declared that production credit associations chartered thereunder are federal instrumentalities, and that, as such, their "notes, debentures, bonds, and other such obligations * * * shall be exempt both as to principal and interest from all taxation" except for "surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. A broader exemption was, however, dependent upon continuing stock ownership by a production credit corporation or, later, by an officer of the Farm Credit Administration. *Ibid.*; Pub. L. No. 92-181, § 2.17, 85 Stat. 602. By 1968, the basis for the broader exemption no longer existed, because the federal government did not hold any stock interest in any production credit association. See H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971).

In 1985, Congress passed various technical amendments to 12 U.S.C. 2077 (formerly codified at 12 U.S.C. 2098 (Supp. III 1985)), one of which deleted the no longer effective provisions for the original broader exemption from taxation. Nothing in the history of Section 2077 suggests that Congress intended those technical changes to grant to production credit associations any revived or new immunities. After 1968, no association (as distinguished from the association's obligations) had been entitled to immunity from state or local taxation because the federal government maintained no stock holdings in any of them. The original provisions, therefore, had become surplusage. Had Congress intended to alter the status quo in the 1985 amendments and to revive production credit associations' immunity from taxation by removing the federal stock ownership requirement, it is unlikely that it would have done so by a "technical amendment." See

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative history] * * * while contemplating an important and controversial change in existing law is unlikely.").

It would be particularly implausible to read Section 2077 so as to ascribe to Congress an intent to grant a production credit association a comprehensive immunity from taxation without regard to whether the federal government owned stock in it—an immunity that the associations never have enjoyed. The court below interpreted Congress's technical amendments in 1985 as if Congress had deleted the condition precedent to the broad exemption, namely the federal government's stock ownership, but had not deleted the exemption itself. There is no support in the language of the amendment, or its history, for that extraordinary result.

b. The conclusion that Congress did not intend to confer on production credit associations the broad exemption from tax advocated by respondents is further supported by the statutory context and legislative history of the Farm Credit Act more generally. Congress determined in that Act which of the federally chartered lending institutions within the farm credit system are entitled to comprehensive immunity from taxation and which are not. In addition to production credit associations, the federal farm credit system includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a). With respect to each entity, the Farm Credit Act contains a "taxation" provision. 12 U.S.C. 2023 (farm credit banks), 2077 (production credit associations), 2098 (federal land bank associations), 2134 (banks for cooperatives). For farm credit banks and federal land bank associations, Congress explicitly provided the type of comprehensive immunity that the court of appeals granted to the production credit associations here. For example, under 12 U.S.C. 2023,

> [t]he Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed.

That exemption language is almost identical to that which applies to federal land bank associations in 12 U.S.C. 2098. As to both entities, the exemption language has been largely unchanged since the Farm Credit Act of 1971. See Pub. L. No. 92-181, §§ 1.21, 2.8, 85 Stat. 590, 597.[8]

Banks for cooperatives, by contrast, have been granted only the limited exemption from taxation accorded to production credit associations. 12 U.S.C. 2134. In fact, prior to the 1985 amendments to the Farm Credit Act, banks for cooperatives (like production credit associations) possessed a broad-based exemption from taxation that was contingent upon the United States' stock ownership. See Pub. L. No. 92-181, § 3.13, 85 Stat. 608. That contingent exemption was repealed in 1985 by the same technical amendments that applied to the associations. See Pub. L. No. 99-205, § 205(e)(10), 99 Stat. 1705.

Congress thus "intentionally and purposely" chose to grant an expansive immunity from taxation to farm credit banks and federal land bank associations, while at the same time conferring only a more limited exemption, with respect to their obligations, to production credit associations and banks for cooperatives. Had Congress wished to provide production credit associations with the more

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[8] Section 1.21 of the Farm Credit Act of 1971 addressed the taxation of both federal land banks and federal land bank associations. Section 2.8 referred to the taxation of federal intermediate credit banks. Federal land banks and federal intermediate credit banks were merged and became "farm credit banks" under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 410, 101 Stat. 1637 (1988) (codified at 12 U.S.C. 2011(a)). As part of the 1987 Act, the taxation statutes were redesignated as Section 1.15 and 2.17 for farm credit banks and federal land bank associations, respectively. Pub. L. No. 100-233, § 401, 101 Stat. 1629, 1637.

comprehensive exemption from taxation that it had provided federal credit banks and federal land bank associations, it presumably would have done so expressly as it had elsewhere in the Farm Credit Act. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress, however, did not "write the statute that way." *Russello*, 464 U.S. at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)). The effect of the court of appeals' decision is to grant to respondents a tax exemption equal to or potentially greater than that which Congress explicitly provided to farm credit banks and federal land bank associations (see Pet. App. A11 & n.5). That result alters significantly the extent to which States and localities have been empowered to tax production credit associations since at least 1968. There is no indication in the Farm Credit Act, in Section 2077, or in the legislative history that Congress meant for its 1985 "technical" amendments to have such a sweeping effect.

c. The court of appeals' decision thus incorrectly calls into question the continuing validity of state court decisions holding that production credit associations are liable for state taxes if the federal government does not hold an ownership interest in them. See, *e.g.*, *Columbus Production Credit Ass'n* v. *Bowers*, 180 N.E.2d 1 (Ohio), cert. denied, 371 U.S. 826 (1962); *Woodland Production Credit Ass'n* v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231 (Cal. Dist. Ct. App. 1964).[9] The court of appeals

[9] In other state court decisions, the underlying liability for state taxes had been decided or conceded, and the issue presented addressed collateral issues, such as apportionment or deductibility. See, *e.g.*, *Klamath Production Credit Ass'n* v. *State Tax Comm'n*, 444 P.2d 923 (Or. 1968) (in banc) (determining which State—

reached this unfortunate result, moreover, in a case in which subject-matter jurisdiction was lacking in the federal courts (see pp. 7-14, *supra*). While that lack of subject-matter jurisdiction should, in our view, be dispositive of the case, the failure of the courts below to comply with the strictures of the Tax Injunction Act presents a question that is itself worthy of this Court's consideration—particularly in light of the contrary results that have been reached in other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted. In addition to the question presented in the petition, the parties should be asked to address whether the case should have been dismissed by the district court for lack of subject-matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. 1341.

Respectfully submitted.

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California or Oregon—is the appropriate taxing jurisdiction for apportioning taxes on production credit association); *Production Credit Ass'ns of Lansing* v. *Michigan Dep't of Treasury*, 273 N.W.2d 10 (Mich. 1978) (considering appropriateness of deductions for production credit associations subject to tax); *Farmers Production Credit Ass'n of South Burlington* v. *Vermont*, 481 A.2d 18 (Vt. 1984) (holding production credit association subject to state tax).

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